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NEW YORK PARK AVENUE VIADUCT CASES.

Supreme Court of the United States,

OCTOBER TERM, 1903.

FILED
OCT 5 1903
JAMES H. McKENNEY,
Clerk.

HENRY MUHLKER,
Original Plaintiff and Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants and Defendants in Error.

No. 384,
Error to the Supreme Court of New York.

MOTION TO ADVANCE FOR HEARING UNDER RULE 26.

JAMES C. BUSHBY and
L. M. BERKELEY,
Attorneys for Plaintiff in Error,
220 Broadway, New York City.

HENRY G. ATWATER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1903.

HENRY MUHLKER,
Original Plaintiff and Plaintiff in Error,

AGAINST

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants and Defendants in Error.

No.
Error to the Supreme Court of New York.

NOTICE OF MOTION TO ADVANCE FOR HEARING UNDER RULE 26.

SIR:

Notice is hereby given that the annexed motion to advance for hearing the above-entitled case which is numbered 387 on the docket of this court for the October Term, 1903, under section 7 of rule 26, will be presented upon the record in said case to the Supreme Court of the United States, at the Capitol in the City of Washington, D. C., on Monday, the 12th day of October, 1903, at the coming in of the Court on that day, or as soon thereafter as counsel can be heard.

WASHINGTON, D. C., October 2nd, 1903.

JAMES C. BUSHBY, and
L. M. BERKELEY,
Attorneys for Plaintiff in Error,
220 Broadway,
New York City.
HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

HENRY MUHLKER, *Original Plaintiff & Plaintiff in Error,* AGAINST THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Original Defendants & Defendants in Error.*	No. Error to the Supreme Court of New York.

MOTION TO ADVANCE FOR HEARING UNDER RULE 26.

Upon the record in the above-entitled case, the original plaintiff and plaintiff-in-error moves that said case be advanced for hearing upon the docket of the Court, and respectfully submits the following brief statement of the matter involved with the reasons for the application:

STATEMENT OF THE MATTER INVOLVED.

This action was brought January 7, 1897, in the Supreme Court in the County and State of New York by Henry Muhlker, original plaintiff and plaintiff-in-error, to recover damages for injury to plaintiff's property by reason of the construction and operation by defendant railroad companies of an elevated or viaduct railroad upon what is known as Fourth or Park Avenue in Manhattan, in the City of New York. Plaintiff was the

owner of a lot on which was erected a tenement house fronting on said avenue. Prior to 1892 the defendants' railroad tracks had been laid in a subway or trench on said Park Avenue in front of plaintiff's premises, and for a long distance up and down the avenue. Between 1892 and 1897 such changes were made that the said railroad was elevated and placed upon a steel viaduct over the former road-bed in a manner substantially like the other elevated railroads in the City of New York. Prior to that time it had been already decided in actions brought against the companies operating the original elevated railway system in New York City, that property owners were entitled to recover compensation for damages caused by the construction and operation of elevated railroads in the streets of New York, including damages caused by the appropriation by such railroads of the easements of light, air and access appurtenant to said properties, and this although the erection of said elevated railroads had received municipal and legislative sanction, it being held in those actions that there was no authority in the municipality or legislature to take private property of this character without due process of law and compensation therefor.

The present action was tried in the City of New York in equity before a justice and without a jury, and plaintiff recovered the sum of $3,000 damages to the fee and $1,400 rental damages, and the judgment upon appeal by the defendants was affirmed by the Appellate Division of the Supreme Court of the State of New York. But upon appeal by defendants to the Court of Appeals, which is the Court of last resort in the State of New York, the judgment was reversed and the record returned to the Supreme Court with directions to dismiss the complaint.

The principal ground of the decision of the New York Court of Appeals and the determination which it is desired to present to this Court for review is, that the railroad structure having been erected by legislative mandate and State supervision, the defendants were not liable for damages caused to plaintiff's property either by

the construction or the present maintenance and operation thereof by defendants in error.

In making this decision the Court of Appeals of the State of New York decided in favor of the validity of Chapter 339 of the Laws of 1892 of the State of New York and amendments thereof and of the authority exercised thereunder by defendants to take the plaintiff's property without compensation and without due process of law, and further decided against the claims of the plaintiff and plaintiff in error that said statutes and the authority exercised thereunder were repugnant to the Constitution of the United States. The following Federal questions were therefore involved herein:

1. Whether the property rights and easements of the plaintiff and plaintiff in error have been taken without due process of law, and without compensation in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States.

2. Whether the obligation of certain contracts under which the plaintiff's said property rights and easements were created and existed have been impaired by the taking of said property rights and easements in violation of Section 10 of Article 1 of the Constitution of the United States.

Both these questions are fairly and clearly raised in these cases as appears not only by the record of the proceedings in the said Court, but also by the final decision of the Court of Appeals which recites that said questions were before it and were decided as aforesaid.

Reasons for the Application to Advance the Case.

I.

The matter involved is one of general public interest in the City of New York, and there are special and peculiar circumstances why this cause should be advanced. There are about two hundred pieces of proj-

erty fronting on Park Avenue which have suffered damage similar to that of plaintiff's property herein, and about one hundred and sixty actions including claims amounting to over $2,000,000 have been brought and are now pending in the Supreme Court, County and State of New York, by property owners similarly situated to plaintiff, to recover such damages, all founded upon practically the same state of facts as set forth in the complaint in this action, and all defended upon practically the same grounds, namely, that the railroad companies, defendants and defendants in error herein, erected the railroad structure in question under an express mandate of the legislature. In some of these cases other questions are involved, as for example, questions of title or claims of express or implied consent by plaintiffs or their ancestors to the erection of the structure, but in all the cases the main question is as to the validity and effect of Chapter 339 of the Laws of 1892 of New York aforesaid. In some instances it is claimed and the recoveries show that properties have decreased twenty-five per cent. in their value in consequence of the erection and operation of the elevated railroad structure in question.

There has been considerable doubt, conflict and perplexity in the Courts of New York in dealing with these questions. At first the Court of Appeals sustained the claims of the property owners and affirmed a judgment in favor of one Lewis obtained against defendants in error herein, on grounds precisely similar to the plaintiff's claim in this action (*Lewis* v. *N. Y. & Harlem Ry. Co.*, 162 N. Y., 202, decided Feb. 27, 1900). Subsequently, and in February, 1902, the decision of the Lewis case was overruled in the Court of Appeals, in the present case of *Muhlker* v. *N. Y. & Harlem Railway Co.*, 173 N. Y., 549, and in the *Kierns case*, 173 N. Y. 642. Two judges of the Court of Appeals dissented in the present case from the prevailing opinion of the Court. Another judge of that Court writing in another similar case, announced his dissatisfaction with the decision. The dissenting judges however stated that

hereafter they would vote with the majority to dismiss all these cases under the rule of *stare decisis* (173 N. Y., 643), and accordingly in the Siegel and Birrell cases also brought against the defendants in error, they have recently dismissed complaints without opinion (173 N. Y., 644).

II.

The present situation in the Courts of New York is this. There are about one hundred and sixty actions pending for the recovery of damages in cases similar to this action. The Court of Appeals has dismissed the complaints in six of these actions. This is the first in which a writ of error to this Court has been taken, but applications for such writs of error are about to be made in the other five cases in which dismissals were obtained. In five other cases where judgments were obtained by the property owners, the Appellate Division of the Supreme Court has allowed new trials in order that the constitutional questions here presented may be formally placed upon the record in the Trial Court in order to insure a review thereof by the Supreme Court of the United States.

In fourteen other cases where trials have been had, said constitutional questions were specifically raised by the plaintiffs and property owners, and decision upon those specific grounds rendered in their favor by the Trial Court in New York County, in each case, and all such cases are also on appeal to the Appellate Division of said Court.

In twelve other similar cases which have been tried, decision has been withheld by the Court of first instance, awaiting the result of the efforts now being made to obtain a hearing in this Court. There are about one hundred and thirty other similar cases on the calendar of the New York Supreme Court awaiting trial at the present time, in one of which a stay has been granted by the New York Supreme Court pending proceedings in this Court, and in most of the others by agreement between counsel, proceedings have also been stayed awaiting action of this tribunal in the present case.

III.

The decision of this case by this Court, and the determination of the Federal questions involved will save the one hundred and sixty persons interested as plaintiffs in these actions, and their counsel, and the witnesses, and the justices of the courts in New York an enormous amount of time, trouble, labor and expense. The New York Court of last resort has spoken its last word on the main question. It is conceded that that main question involves the application of the Federal Constitution, and all the above cases must sooner or later come to the Supreme Court of the United States for determination.

Although the questions we presented to this tribunal are merely questions of law and are the same in each one of these cases, yet the trials in the first instance require a different preparation and the presentation of different facts in each case, according to the character of the property, and the title and history thereof. Among other extraordinary items of expense attending trial in each of these cases is the testimony of real estate experts, of whom it is usual to call two on each side in these cases. If each one of these one hundred and sixty cases is required to go to trial, it will involve an expense to the parties concerned for counsel, experts and printing of at least $1,000 on an average in each case before it will have reached this Court.

In many of the said pending cases the attorneys and counsel making this application are interested and we have reason to know that most, if not all of said cases, will be presented to this Court if necessary to obtain a decision on the constitutional questions pending.

IV.

The decision of this Court will be of enormous value to the State Courts of New York in the trial of these one hundred and thirty causes now pending therein, and on the re-trial of others where re-trials may be ordered, if in any case such re-trials are to be had. The State

Courts of New York have differed not only on the main question as to whether property owners were entitled to any compensation in this matter, but also on another important question, namely, whether compensation should be awarded merely for the damages accruing after construction of the viaduct in question, or whether property owners were entitled to compensation for damages caused by the erection of the structure. The State Supreme Court in some instances held that property owners might recover for all damages accruing, as well from the construction of the road as from its operation. The Court of Appeals at first held in the *Lewis* case that such damages were recoverable as accrued from the operation of the road, because that operation was carried on by defendants for their own benefit, but not such as accrued during the period of construction which lasted several years, because such construction was the result of a positive mandate of the legislature of New York, and was conducted under the supervision of the legislative commission.

It is apparent, therefore, that a speedy hearing and determination of the questions involved in this case by this Court will be of great value to the New York Courts; that it will save a great number of people much anxiety and expense, and that it will obviate the necessity of trials, appeals and re-trials of numerous cases, and that in fact the circumstances under which this motion is made were special and peculiar and entitle this case to be advanced upon the calendar.

V.

The City of New York has begun a proceeding to determine whether or not an assessment should be imposed upon abutting property owners to pay about $800,000 towards the expense of constructing said elevated railroad structure. Commissioners, appointed by the New York Supreme Court, are now taking testimony, and the officials of said city, as well as the entire population thereof, are interested in the determination of the questions presented in this case.

VI.

The plaintiff in error therefore prays that this case may be advanced for argument to as early a date as may be convenient for the Court.

Notice of this motion has been served on Ira A. Place, Esq., attorney for the defendants in error.

New York City, October 2d, 1903.

JAMES C. BUSHBY & L. M. BERKELEY,
Attorneys for Plaintiff in Error.

HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Of Counsel for Plaintiff in Error.